2010

Nathan Nolan Jardine v. Office of Professional Conduct : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

FOR THE STATE OF UTAH

In the Matter of the
Discipline of

Nathan Nolan Jardine

Respondent and Appellant,

Office of Professional Conduct

Appellee.

District Case No:
020901858

Supreme Court Case No.
20100698
00-SC

BRIEF OF APPELLANT

Appeal from the decision of the Honorable Denise Lindberg,

Third Judicial District Court, Salt Lake County.

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JURISDICTIONAL STATEMENT

This is an appeal from a Suspension Order made by Judge Denise Lindberg of the Third District Court. The order suspends respondent/appellant, Mr. Jardine, from the practice of law for three years. Jurisdiction is conferred upon this court pursuant to Utah Code Ann. Section 78A-3-102 (c).

This court has jurisdiction over this appeal pursuant to Utah Rules of Appellate Procedure Rule 3 because the Order of Suspension was filed in the District Court on August 10th, 2010. The Notice of Appeal was filed on July 15th, 2010. Since the Notice of Appeal was filed after the suspension order was enunciated (on June 16, 2010), but before it was actually entered, Rule 4(c) of the Utah Rules of Appellate Procedure operates to deem the Appeal to have been filed on August 10th, 2010. The Notice of Appeal was filed in a timely fashion.

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Exhibit "A" in the Addendum is a document entitled, Respondent's Proposed Amendments to Submitted Findings of Fact, Conclusions of Law, and Order and Objections to the Same. The document was submitted to be filed, referred to by Judge Lindberg in the Sanctions Hearing, (Record on Appeal: 607-4, 5) but the document does not appear in the Record on Appeal. A motion will be filed to include it as part of the record. This document is at least one place where

almost all of the issues discussed herein were preserved for appeal. It will be referred to hereinafter as "Respondent's Proposed Amendments."

This case concerns four matters as explained in the Statement of Facts, and referred to respectively as the Mecham, Gardner, Loomis and OPC (Office of Professional Conduct) matters. The first six issues stem from Mr. Jardine's application of Ethics Opinion 136 to the Non-refundable retainer that he charged in the Mecham and Gardner matters.

Commingling Issues:

1. Whether the trial court properly found Nathan Jardine (hereinafter "Mr. Jardine") in violation of Rule 1.15(a) of the Rules of Professional Conduct (Safekeeping Property) in the Mecham matter. This is commonly referred to as the rule that prohibits a lawyer from commingling his funds with those of his clients. The parties agree that, pursuant to a non-refundable retainer agreement, Mr. Jardine took a retainer from Susan Mecham and deposited it into his general account instead of his trust account. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000). Preserved for appeal in Respondent's Proposed Amendments at p.23.

2. Whether the trial court properly found Mr. Jardine in violation of Rule 1.15(a) of the Rules of Professional Conduct (Safekeeping Property) in the

Gardner matter. The parties agree that, pursuant to a non-refundable retainer agreement, Mr. Jardine took a retainer from Mildred Gardner's agent and deposited it into his general account instead of his trust account. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000). Preserved for appeal in Respondent's Proposed Amendments at p. 23.

Deposit Issues.

3. Whether the trial court properly found Mr. Jardine in violation of Rule 1.15(c) (Safekeeping Property) of the Rules of Professional Conduct in the Mecham matter. This rule requires a lawyer to place advance, unearned fees into his/her trust account to be withdrawn when the fees are earned. The parties agree that, pursuant to a non-refundable retainer agreement, Mr. Jardine took a retainer from Susan Mecham and deposited it into his general account instead of his trust account. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000). Preserved for appeal in Respondent's Proposed Amendments at p. 24.

4. Whether the trial court properly found Mr. Jardine in violation of Rule 1.15(c) of the Rules of Professional Conduct (Safekeeping Property) in the Gardner matter. The parties agree that, pursuant to a non-refundable retainer

agreement, Mr. Jardine took a retainer from Mildred Gardner's agent and deposited it into his general account instead of his trust account. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000). Preserved for appeal in Respondent's Proposed Amendments at p. 24.

Excessive Fee Issues.

5. Whether the trial court properly concluded that Mr. Jardine was in violation of Rule 1.5(a) of the Rules of Professional Conduct (Fees) in the Mecham matter. Preserved for appeal in Respondent's Proposed Amendments at P.19. Rule 1.5(a) discusses various factors that should be considered in determining whether a fee charged is "clearly excessive" or unreasonable. The trial court issued a document entitled, Findings of Fact, Conclusions of Law, and Order of Suspension or August 10th, 2010. The document is divided into sections. In this brief, the terms "Findings of Fact" refers to the Findings of Fact section in the aforementioned document. None of the facts contained in the court's Findings of Fact, address any issue pertaining to Rule 1.5(a) or the factors contained therein. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000).

6. Whether the trial court properly found Mr. Jardine in violation of Rule

1.5(a) of the Rules of Professional Conduct (Fees) in the Gardner matter. The court made a Finding of Fact that Mr. Jardine did "nothing in furtherance of the representation." Since this finding is in dispute, the evidence must be marshaled and the finding will not be set aside unless it was clearly erroneous. *Traco Steel Erectors, Inc., v. Comtrol, Inc.* 222 P.3d 1164, 1169, 645 Utah Adv. Rep. 30, 2009 UT 81. Preserved for appeal in Respondent's Proposed Amendments at p. 21.

7. **Misconduct.** Whether the trial court properly found Mr. Jardine in violation of Rule 8.4(d) of the Rules of Professional Conduct (Misconduct) in the OPC matter. The Court found that Mr. Jardine's secretary had informed him that the matter was continued but that Mr. Jardine did not verify the information before he failed to appear, and he did not verify the information before he instructed his client not to appear. Since Mr. Jardine and his client failed to appear at a court appearance the court found Mr. Jardine in violation of the rule. Mr. Jardine does not dispute these factual findings, but he does dispute the conclusion that he violated Rule 8.4(d) through these actions. Accordingly, the court can review this matter for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000). Preserved for appeal in Respondent's Proposed Amendments at p. 25.

8. **Confidentiality.** Whether the trial court properly found Mr. Jardine in violation of Rule 1.6(a) of the Rules of Professional Conduct (Confidentiality of

Information) in the Mecham matter. The court made a finding that, when Mr. Jardine sent Ms. Mecham's file to her, that he included a the file of another client. Mr. Jardine disputes this finding because it was his secretary that sent the wrong information. Since this finding is in dispute, the evidence must be marshaled and the finding will not be set aside unless it was clearly erroneous. *Traco Steel Erectors, Inc., v. Comtrol, Inc.* 222 P.3d 1164, 1169, 645 Utah Adv. Rep. 30, 2009 UT 81. Preserved for appeal in Respondent's Proposed Amendments at p. 22.

9. **Competence.** Whether the trial court properly found Mr. Jardine in violation of Rule 1.1 of the Rules of Professional Conduct (Competence) in the Loomis matter. Preserved for appeal in Respondent's Proposed Amendments at p.14. None of the facts contained in the Findings of Fact address the issue of competence. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000).

10. **Communication of Scope.** Whether the trial court properly found Mr. Jardine in violation of Rule 1.2(a) of the Rules of Professional Conduct (Scope of Representation) in the Gardner matter. Preserved for appeal in Respondent's Proposed Amendments at p.16. None of the facts contained in Findings of Fact address this issue. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000).

Communication Issues.

11. Whether the trial court properly found Mr. Jardine in violation of Rule 1.4(a) of the Rules of Professional Conduct (Communication) in the Loomis matter. Preserved for appeal in Respondent's Proposed Amendments at p.17.

a. The Trial Court made various adverse findings of fact regarding the alleged lack of communication in this matter. These findings are in dispute; therefore, the evidence must be marshaled and the findings will not be set aside unless it was clearly erroneous. *Traco Steel Erectors, Inc., v. Comtrol, Inc.* 222 P.3d 1164, 1169, 645 Utah Adv. Rep. 30, 2009 UT 81.

b. Prior to the trial, the parties agreed that a binder full of exhibits would be admitted into evidence at trial. One of the exhibits, Exhibit 48 is an Affidavit of Jorie Loomis which shows the Mr. Jardine communicated with him. The court refused to accept this and the other exhibits at trial. Whether it should have been included in the evidence is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000).

12. Whether the trial court properly found Mr. Jardine in violation of Rule 1.4(a) of the Rules of Professional Conduct (Communication) in the Gardner matter. Preserved for appeal in Respondent's Proposed Amendments at p.18. The Findings of Fact do not discuss this issue. They do not support the Conclusion of

Law that Mr. Jardine failed to communicate with Mildred Gardner, his client. Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000).

13. **Punishment.** Whether the punishment levied upon Mr. Jardine was appropriate for the Rule violations committed. This Court is the final decision maker with respect to punishment levied upon attorneys in this state. *In Re Johnson*, 48 P.3d 881, 887 (Utah 2001). Therefore, this is a question of law that must be reviewed for correctness. *Mackey v. Cannon,* 996 P.2d 1081, 1084 (Utah 2000).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES

Rules of Professional Conduct:

1. **Rule 1.1. Competence.**
2. **Rule 1.2(a) Scope of Representation and Allocation of Authority Between Client and Lawyer.**
3. **Rule 1.4 Communication.**
4. **Rule 1.4 Communication.**
5. **Rule 1.5 Fees.**
6. **Rule 1.6 Confidentiality of Information.**

7. **Rule 1.15 Safekeeping Property.**

8. **Rule 8.4 Misconduct**

STATEMENT OF THE CASE

On June 16, 2010, Judge Denise Lindberg enunciated an order suspending Mr. Jardine from the practice of law for a period of three years. The Court found that Mr. Jardine had committed 15 rule violations. Mr. Jardine admits to three of the 15 including failing to act with diligence, failing to return his client's file in a timely manner, and Rule 8.4(a) which states that violating the rules of professional conduct is a separate rule violation.

The other 12 alleged rule violations are the subject of this appeal. Six of the 12 allegations relate to Mr. Jardine's practice of charging a non-refundable retainer and his reliance on Ethics Opinion 136. The other six allegations relate to communication, competence, and misconduct, and the fact that Mr. Jardine's secretary divulged confidential information. The court specifically found that the OPC did not prove Mr. Jardine was involved in dishonesty, fraud or deceit.

STATEMENT OF FACTS

Mr. Jardine was charged with rule violations with respect to four different matters – Mecham, OPC, Gardner and Loomis.

Mecham. Susan Mecham, a woman living in Vernal Utah, was charged

with Aggravated Kidnaping where her husband was the complaining witness. Record on Appeal (ROA), 605-38, 82-83, 174. She hired Mr. Jardine to represent her with respect to this First Degree Felony charge as well as with respect to her divorce proceedings. *Id.* Mr. Jardine charged her a total of $10,000, which the fee agreement described as a non-refundable retainer, for both cases. ROA, 605-39. In the meantime, Ms. Mecham found herself the subject of a protective order action and Mr. Jardine agreed to help he with that matter as well. ROA, 605-83.

Mr. Jardine went to the Vernal Area from the Salt Lake Valley on five different occasions for court appearances, prepared for the court appearances, prepared and filed a Motion for Temporary Alimony, and reviewed a four inch stack of documents which Ms. Mecham asked him to review in connection with the divorce matter. ROA, 605-153, 172, 173. Exhibit 68.

Furthermore, he obtained very good results for Ms. Mecham. In the criminal matter he persuaded the prosecuting attorney to file an amended information reducing the First Degree Felony to a Third Degree Felony in exchange for Ms. Mecham waiving her preliminary hearing. ROA, 606-23,24. Prosecutor Mark Thomas testified that this was a result seldom obtained by defense attorneys. *Id.* In the divorce case Mr. Jardine prevented Ms. Mecham from testifying at any hearings so that she would not have conflicting testimony in

her criminal matter, and he obtained $5,000 for her by way of temporary relief. ROA 605-173-74. In the protective order hearing, Mr. Jardine effectively cross examined Ms. Mecham's husband, and in her words, "made him out to be the fool he was." ROA:605-148. Mr. Jardine also prevented Susan Mecham from testifying in the Protective Order matter so that she could not be crossed with possible inconsistent statements in the criminal matter. ROA:173-74.

In response to the allegations in this disciplinary case concerning the Mecham matter, Mr. Jardine reviewed the court dockets, and his file materials and prepared Exhibit 68 showing that at his regular hourly rate of $150 per hour the time spent on the Mecham matter would have totaled at least $13,500 if billed on an hourly basis. This was the only evidence submitted regarding the time spent on the Mecham matter and the value of that time. ROA Exhibit 68.

Despite these good results and the effort expended to obtain them, the court found that Mr. Jardine had charged Ms. Mecham an excessive fee under Rule 1.5. ROA: 508-09.

Mr. Jardine relied on Ethics Opinion 136 when he prepared the fee agreement in the Mecham matter. ROA: 605-43-44. The Ethics Opinion states that a non-refundable retainer may be placed in the Attorney's general account instead of his trust account. ROA: Exhibit 83:1. In reliance upon the opinion,

when Mr. Jardine received the $10,000 retainer from Ms. Mecham, he placed it in his general account. ROA: 605-43. The court found two separate violations of Rule 1.15 for this action – one for commingling funds and another for failing to deposit the money into his trust account and withdrawing it as earned. ROA: 510-512.

When Susan Mecham asked for her file, Mr. Jardine instructed his secretary to send the file to her. ROA: Exhibit 66. Unfortunately, Mr. Jardine's secretary was new to his office, and although she had 30 years of experience, she made the mistake of including some papers belonging to another client, which had been misfiled, in the file she sent to Ms. Mecham. The court found Mr. Jardine in violation of Rule 1.6 and indicated that Mr. Jardine had divulged confidential information. ROA: 605-509-10.

The court also found that Mr. Jardine had violated Rule 1.16(d) by not returning the file promptly. Mr. Jardine agrees with that finding. ROA: 605-512-13.

OPC. In the OPC matter, Mr. Jardine represented a client by the name of Kevin Woods who had been charged with two DUIs. ROA: 605-73. The court set a jury trial. ROA: 605-502. Mr. Jardine's secretary told him that the trial had been continued and so he didn't appear at the trial. ROA: 605-39. Mr. Jardine

spent the day working in his office and received no calls from anyone regarding the trial. ROA: 605-176.

Despite the fact that the prosecution had witness problems and could not go forward on that day, and despite the fact that the court had ten other matters set for trial that day, Judge Virginia Ward of the justice court personally sent a letter to the OPC even though there was no evidence to suggest that Mr. Jardine had demonstrated a pattern of missing hearings or trials in Judge Ward's or anyone else's court. ROA: 605-166. Kevin Woods never complained; he was happy that the matter had been continued. ROA:605-177. The disciplinary Court found that Mr. Jardine had violated Rule 8.4(d) (misconduct) because Mr. Jardine had impeded justice. ROA: 605-163,165; 513.

Gardner. Mildred Gardner was an elderly lady that was having problems with her son, David Gardner. ROA: 605-14,15. He was harassing her. *Id.* Mildred wanted the harassment to stop and wanted to disinherit him. *Id.* She was good friends with a person named Kelli Hatch who had been one of Mr. Jardine's employees. *Id.*

Ms. Hatch appropched Mr. Jardine in Ms. Gardner's behalf and asked him if he would work on revising her estate documents and work to prevent the

harassment from David Gardner. *Id.* Mr. Jardine told Ms. Hatch that he didn't do Estate Planning work and referred her to another Attorney. *Id.* However, Mildred Gardner, and Kelli Hatch talked about the matter, and Ms. Gardner decided that she wanted to hire Mr. Jardine to help her. *Id.*

A handwritten note was signed by Ms. Gardner whereby she indicated that she wanted to hire Mr. Jardine, that she understood the money she was paying him was a non-refundable retainer, and that she was in ill health but that she would come into Mr. Jardine's office at a later time to formalize the agreement. ROA: Exhibit 7. Despite repeated efforts on Mr. Jardine's part to schedule a meeting, Ms. Gardner never came in to formalize the agreement. ROA: 605-76, 77. Ms. Gardner's note indicated she was paying Mr. Jardine a non-refundable retainer and was hiring him to work on her "financial affairs." ROA: Exhibit 7. Mr. Jardine accepted the note and a $5,000 check which he did not deposit into his trust account. Instead, he used it for business and personal expenses relying on Opinion 136.

During the next six months, Mr. Jardine took steps to stop Ms. Gardner's son from harassing her and did other many other things in furtherance of the representation as described below. He scheduled several appointments with Ms. Gardner which she was unable to keep, and he was otherwise available to her on

retainer for a period of six months. ROA: 605-27, 29, 30, 76, 77, 177-79.

About six months after the inception of the representation, Mildred Gardner was determined to be incompetent, and an attorney was appointed to assist her. Her attorney asked for a return of the retainer. ROA: 605-126,127. Mr. Jardine returned $2,000 of the $5,000 and kept $3,000 for the work he had done and for being available for Ms. Gardner. ROA: 605:129.

The court found Mr. Jardine in violation of Rule 1.5, charging an excessive fee; it found him in violation of Rule 1.15(a) , commingling funds; it found him in violation of Rule 1.15(c) failing to deposit funds into a trust account and failure to withdraw funds as they were earned; and, it found him in violation of Rule 1.4(a) failing to communicate with Ms. Gardner about the scope of representation. ROA: 605: 507-512.

Loomis. Jorie Loomis was wrongfully arrested by the Utah Highway Patrol because the UHP officer thought Mr. Loomis was driving on a suspended license. ROA: 605-58. Mr. Loomis hired Mr. Jardine to file a lawsuit against the UHP for the wrongful arrest. ROA: 605-59 A demand letter, Notice of Claim, and a complaint were filed in a timely fashion. ROA: 605-59, 61. However, the complaint was not served within 120 days as required by law so, after two years, Mr. Jardine moved to dismiss the complaint and re-filed it within three days.

ROA: 605:63. The court found that Mr. Jardine had violated Rule 1.3 because he was not diligent in prosecuting the matter, and Mr. Jardine agrees with the court's conclusion. ROA: 506, 507.

The complaint was re-filed and served on the UHP office in Salt Lake, but, it should have been served on the UHP office in Heber City, Utah. ROA: 605-64, 65. The UHP did not respond to the lawsuit so Mr. Jardine attempted to take the UHP's default. *Id.* Before the default judgment could be entered, the Attorney General appeared and moved to quash the summons and dismiss the case because the process had been served on the UHP at the wrong location. *Id.*

Mr. Jardine agreed with the Attorney General and thought the court would probably dismiss the case. *Id.* He waited for the court to dismiss the case so that he could re-file and re-serve the matter on the UHP at the right location. ROA: 605-67. Although the court received a request for a ruling on the matter, it did not dismiss the case until about a year later. ROA: Exhibit 51.

Within the time required by the Saving Statute, Mr. Jardine re-filed the complaint, but by that time Jorie Loomis had complained to the Utah State Bar and was in the process of discharging Mr. Jardine as his attorney. ROA: 605:87, Exhibits 51, 52.

Jorie Loomis was informed in writing about the dismissal of each

complaint, and the re-filing of each complaint. ROA: Exhibits 46, 99-101; ROA: 605-87,88. He was also informed in writing about the motion to enter default. He signed an affidavit in support of the default motion. ROA: Exhibit 48. Despite this, the court found Mr. Jardine in violation of Rule 1.4 (communication.) ROA: 507. The court also found Mr. Jardine in violation of Rule 1.1, competence. ROA: 505.

Mr. Jardine was also found in violation of Rule 8.4(a) which states that if an attorney has violated the Rules of Professional Conduct, he has also violated rule 8.4(a). ROA: 513. Mr. Jardine agrees with that judgment.

SUMMARY OF THE ARGUMENT

Mr. Jardine with charged with violation of the Rules of Professional Conduct in four different matters known herein as the Mecham, Gardner, OPC, and Loomis matters. The issues in the Mecham and Gardner matters were mostly centered around Mr. Jardine's application of Opinion 136.

Opinion 136. Opinion 136 is an ethics opinion promulgated by the Utah State Bar. It is intended to give guidance to lawyers regarding their how they may ethically act when they charge a non-refundable retainer.

Non-refundable retainers should be encouraged by this Court. They benefit the public because they allow an attorney to focus on getting the work done instead

of producing billable hours. Mr. Jardine's non-refundable retainer agreement provides a financial incentive for a lawyer to do his best work all the way through the representation. Lawyers who rely on Opinion 136 should not later be sanctioned for so doing.

Opinion 136 specifically states that a lawyer may place a non-refundable retainer in his general account instead of his trust account. Yet Mr. Jardine was charged with four rule violations for following that practice. In each of the Mecham and Gardner matters the court held Mr. Jardine was in violation of Rule 1.15(a) and (c) for depositing the retainers into his general operating account instead of his trust account.

Mr. Jardine did not Violate Rule 1.5. Mr. Jardine was charged with a violation of Rule 1.5 (excessive fees) in the Mecham and Gardner matters. In Mecham, an analysis of the factors contained in Rule 1.5 reveals that the fee was not excessive.

Susan Mecham was charged with a First Degree Felony, Aggravated Kidnaping, and she lived in the Vernal Area. Mr. Jardine's office is in Salt Lake City. Mr. Jardine agreed to represent Susan Mecham with respect to the First Degree Felony, her divorce matter, and a protective order hearing for the sum of $10,000. Susan received an outstanding result. In the felony matter Mr. Jardine

persuaded the prosecutor to reduce the First Degree Felony to a Third Degree Felony in exchange for Susan Mecham waiving her preliminary hearing. In the divorce matter Mr. Jardine filed a Motion for Temporary Orders, obtained $5,000 for his client, and prevented her from testifying so that she would not have possible inconsistent statements in the criminal matter. In the protective order hearing Mr. Jardine cross examined the complaining witness, and according to Susan Mecham, made him "out to be the fool he was" and once again prevented Susan from testifying.

When pressed by the OPC, Mr. Jardine was able to calculate the time he spent in the Mecham matter. It amounted to more than $13,500 worth of billable time. An analysis of the factors of Rule 1.5 reveal that Mr. Jardine did not violate Rule 1.5.

The same is true in the Gardner matter. There, Mildred Gardner was having difficulty with her son David Gardner. He was harassing her and she wanted to disinherit him. She hired Mr. Jardine to help her with these problems. Mr. Jardine charged her a non-refundable retainer of $5,000; however, later, when Mildred Gardner became incapacitated and the attorney appointed to her asked for the retainer back, Mr. Jardine provided a 40% refund – $2,000.

The Trial Court found that Mr. Jardine charged an excessive fee in the

Gardner matter. However, an analysis of the factors of Rule 1.5 and the teachings of Opinion 136 reveal that an excessive fee was not charged. Opinion 136 contemplates the very situation Mr. Jardine found himself in. The opinion states that "[an attorney] might well be guilty of charging an excessive fee if he refused to refund part of it." Mr. Jardine returned 40% of the fee.

Additionally, a further analysis of the factors of rule 1.5 reveals that Mr. Jardine did provide a good result to Mildred Gardner – peace of mind. The Findings of Fact in this matter reveal that "nothing was done in furtherance of the representation but the finding is erroneous for 14 reasons. Peace of mind was provided to Mildred Gardner and to her it was worth the money that she paid to Mr. Jardine. Mr. Jardine did not violate Rule 1.5; but in the even this Court determines he was in error, Mr. Jardine's refund of 40% of the fee shows he was trying to follow the rule and, at worst, was negligent in its application.

Mr. Jardine did not Violate Rule 8.4(d). In the OPC matter, the court found Mr. Jardine in violation of Rule 8.4(d) because he failed to appear at a Court Appearance. Mr. Jardine failed to appear because his secretary told him the matter had been continued. The matter was continued because the prosecution had witness availability problems. The court had ten other matters on its calendar that day. Mr. Jardine was available the entire day and spent it working in his office but

received no calls. The rule was not violated.

Mr. Jardine did not violate Rule 1.6(a). At the close of Mr. Jardine's representation of Susan Mecham he instructed his secretary to send Susan Mecham the file. When she sent the file she mistakenly include portions of the file of another client which had been misfiled in the Mecham file. Mr. Jardine did not violate Rule 1.6(a) because it was not Mr. Jardine, but his secretary that sent the wrong file materials. He did not instruct her to send the wrong file materials; he only instructed her to send Susan Mecham's file.

Mr. Jardine did not violate Rule 1.1 (competence). In the Loomis matter, the court held that he violated Rule 1.1. However, the only Findings of Fact regarding this issue were not supported in any way by the evidence. Therefore, the ruling should be overturned.

Mr. Jardine did not violate rule 1.2(a) in the Gardner matter. Rule 1.2(a) essentially states that an attorney should keep a client informed of developments in his case so that the client can make informed decisions and that the attorney should talk with the client about the objectives of representation. In the Gardner matter, none of the Findings of Fact support the conclusion. Additionally the evidence at trial was that Mr. Jardine communicated about the scope of representation with Mildred Gardner's agent, Kelli Hatch.

Mr. Jardine did not violate Rule 1.4 in the Loomis Matter. Rule 1.4 requires an attorney to communicate with his client. The court made several findings relative to its conclusion that the rule was violated, and the findings are disputed. The evidence is marshaled. Jorie Loomis was informed in writing about every major event that took place in his case. Unfortunately, because Mr. Jardine was not as diligent as he should have been, there were not many things to discuss with Jorie Loomis over the course of the six years of representation. Nevertheless, the events that did occur were discussed.

Mr. Jardine did not violate Rule 1.4 in the Gardner matter. The Findings of Fact do not support the Court's Conclusion of Law on this issue. No finding of fact addresses this issue. Furthermore, the representation only occurred over the course of six months. Mr. Jardine was hired to stop Mildred Gardner's son from harassing her. The evidence shows that Mr. Jardine spoke to Mildred Gardner's son as well as to Mildred Gardner herself and that he also set appointments for Mildred Gardner to come into his office to talk, but that she didn't keep the appointments. Since the Conclusion of Law is not supported by the evidence, it should be reversed.

The Punishment Should fit the Wrongs Perpetrated. Mr. Jardine has now been suspended from the practice of law for seven months. He has lost

reputation, and he has suffered devastating financial losses. His home is in foreclosure. He has not been able to pay for his child support. He has lost his office and his office staff. The punishment has already been severe.

Mr. Jardine admits that he should have returned the file more promptly in the Mecham matter and that he didn't act with diligence in the Loomis matter, but these offenses were negligently committed. Mr. Jardine has never had previous discipline for anything like these violations in the past. At worst he should have received a public reprimand for this conduct.

Even if this Court sees the same rule violations as did the trial court, the rule violations were negligently committed with no harm coming to the client. Accordingly, a reprimand would have been appropriate.

This court should reverse the judgment of the Trial Court and determine that a judgment of a public reprimand should have entered instead of a judgment o suspension.

A judgment that Mr. Jardine should have a suspension for longer than 6 months would require Mr. Jardine to perform additional tasks before he could once again practice law. A judgment of suspension is not appropriate in this matter.

ARGUMENT

1. Introduction – The Pros and Cons of the Non-Refundable Retainer.

Six of the Rule violations at issue involve the non-refundable retainer charged by Mr. Jardine. A non-refundable retainer is the type of retainer that is most often charged by Criminal Defense Attorneys in the state of Utah.

In both the Mecham and the Gardner matters, a non-refundable retainer was charged. In the Mecham matter, the fee agreement prepared by Mr. Jardine indicated that $10,000 was to be charged as a non-refundable retainer. The fee agreement gives Mr. Jardine the option, if he so desires, to charge additional amounts in addition to the retainer on a showing that the time spent exceeds $10,000 divided by $150 an hour.

As an experienced and successful attorney of 18 years, Mr. Jardine knew that for the type of case and the issues involved, the $10,000 initial, non-refundable retainer was in line with the fees charged by other attorneys of similar experience for an Aggravated Kidnaping First Degree Felony. Furthermore, he knew it was a reasonable estimation of the minimum time and fees commonly required to successfully resolve a case such as the Mecham case.

If Mr. Jardine was able to successfully resolve the cases to the satisfaction of the client, in less time that estimated, due to his knowledge, skills, experience,

and hard work, the client would be benefitted by the quick and favorable resolution of the case by an experienced attorney. She would be benefitted by knowing up-front the amount of the minimum cost. By knowing this minimum but significant cost up front, the client is benefitted by being able to make the decision at the outset whether to hire an attorney with this level of experience or shop around for another attorney who might offer a lower initial fee, but perhaps with lesser credentials, (experience, references, etc.)

Though obviously a minimum fee creates the possibility that the attorney could simply persuade the client to take an offer that is less than the best possible outcome, in order to do the least amount of work for the fee, that is not what happened here. Nor is it Mr. Jardine's practice to behave in such a fashion. Most of Mr. Jardine's work comes through referrals from other satisfied clients which would not be the case if he failed to obtain very good outcomes for his clients. Selling a client short, so to speak, in order to make a better return on his time is neither the practice nor the reputation of Mr. Jardine.

The particular type of non-refundable retainer agreement entered into by Mr. Jardine in this matter is also beneficial to the client because it gives the Attorney a financial incentive to do the best possible work. The Attorney has a financial advantage to completing the work as quickly as he can. If he can

complete the work quickly, the client benefits because the matter is resolved quickly and the client has the result the client wants.

On the other hand, if the matter does not resolve within the time estimated by the attorney, the attorney has the option of calculating his time and asking the client for additional money to work on the case. Under this scenario, the attorney is not stuck in a situation where he is working on a case that is a losing proposition, financially.

The other advantage to the non-refundable retainer is that the attorney does not have to keep track of his time. He has charged a minimum fee, and as such he is not obligated to keep track of his time. This allows the attorney to focus on getting the work done instead of billing the client.

This point is demonstrated in the Mecham matter. Under the non-refundable retainer agreement, Mr. Jardine is not obligated to keep track of his "billable" hourly time; consequently, as in the Mecham matter, it is not uncommon for an attorney to work more hours on the case than the non-refundable fee would cover if billed on an hourly basis. Here, Ms. Mecham benefitted to the tune of at lest $3,500 that she did not have to pay Mr. Jardine for the time he spent on her three cases.

This Court should support non-refundable retainers because they generally

benefit the client, and this court should particularly support Mr. Jardine's non-refundable retainer because it is designed to benefit the client by ensuring that the best work that can be done, will be done, on the case. The fee agreement provides a financial incentive to ensure this result.

In any event, non-refundable retainers are allowed by the Utah State Bar's own Ethics Opinion 136. Lawyers who rely on that opinion should not be later sanctioned for so doing. The opinion was promulgated by the Utah State Bar. A lawyer should not be sanctioned when he is making a good faith effort to follow an ethics opinion, even if it turns out that he was wrong in the application of the same.

2. Ethics Opinion 136 Allows an Attorney to Deposit Non-Refundable Retainers into His General Account Instead of His Trust Account.

Issues one through four, above, each describe a rule violation that stems from Mr. Jardine's application of Ethics Opinion 136 ("Opinion 136"). Opinion 136 states that since a non-refundable retainer is earned upon receipt, it "may be deposited into the attorney's general operating account rather than [the lawyer's] trust account." (See *Ethics Opinion 136* page 4.) In both the Gardner and Mecham matters, the clients and Mr. Jardine agreed the initial retainer was non-refundable. Mr. Jardine placed each retainer in his general account. Mr. Jardine

relied on the Opinion 136, followed the guidance contained therein, and then was prosecuted by the Bar for doing so.

The Court disregarded Opinion 136 and concluded that Mr. Jardine violated rules 1.15(a) and (c). Rule 1.15(a) states that a lawyer shall keep a client's property separate from his own. Rule 1.15(c) states that a lawyer shall place a fee paid in advance in his trust account and withdraw it only when it is earned. The fees collected in the Mecham and Gardner matter were designated as non-refundable; the agreement between Mr. Jardine and his clients was that the fees were earned when they were collected. Once again, the rule was relied on and followed.

As a matter of law, the trial court should have determined that Rule 1.15(a) and Rule 1.15 (c) were not violated in either the Mecham or the Gardner matters when Mr. Jardine placed the retainers in his general account instead of his trust account.

Without explanation, Judge Lindberg ruled that the ethics opinion did not apply in the Mecham or Gardner matters. With respect to the Mecham matter, she stated, "here we really have a hybrid fee agreement that says this is non-refundable, it's earned as it is. . . this agreement does not fall anywhere near the provisions of Opinion 136 in my judgment." Judge Lindberg gave no reason why

the ethics opinion should not apply to the Gardner matter.

Opinion 136 speaks about how a lawyer should proceed when he charges a non-refundable retainer. It states that a retainer that is earned upon receipt may be placed in the lawyer's general account instead of his trust account. At the very least, a reading of the ethics opinion should cause one to conclude that Mr. Jardine was acting in good faith when he placed the money in his general account instead of his trust account. He wasn't blatantly disregarding the rules. A lawyer should be able to rely on the Ethic's Opinions which are promulgated by the Utah State Bar. A lawyer should feel safe in acting in accordance with those opinions and in using those opinions for guidance. A lawyer should not be sanctioned when he attempts to follow the only guidance there is on a given subject. Any suspension of an attorney's license to practice law under these circumstances strains reason, and a three year suspension based on this conduct is clearly unjust.

Each of the four alleged rule violations regarding rule 1.15 should be reviewed by this Court for correctness. The parties are in agreement that the fees charged were designated as non-refundable retainers. The parties agree that the fees were placed in Mr. Jardine's general account instead of his trust account. The facts are clear.

As between the bar and Mr. Jardine, this Opinion 136 ought to be binding

on OPC an the District Court, and have the force of law or, in the alternative, the OPC should be estopped from taking a position contrary to Opinion 136.

Opinion 136 provides the only guidance relevant to this matter. Accordingly, this Court should not have much concern in finding that the Trial Court erred as a matter of law. Rules 1.15(a) and 1.15(c) were not violated. The rulings regarding these rule violations should be reversed.

3. **Whether a Fixed-Fee Agreement is Clearly Excessive Depends on Whether the Total Fee Meets the Standard Set Out in Rule 1.5.** (See Opinion 136, Page 4.) The court concluded that Rule 1.5 was violated in the Mecham and Gardner matters. Opinion 136 teaches that "whether a fixed-fee agreement is clearly excessive depends on whether the total fee meets the standards set out in Rule 1.5. . ." See Opinion 136 p. 4. The OPC had the burden to prove that the fee was excessive. *In Re: McCullough*, 97 Utah 533, 95 P.2d 13, 14-15 (Utah 1939).

a. **Mecham.** The court made a conclusion of law that Mr. Jardine charged an unreasonable fee to Susan Mecham and violated Rule 1.5. However, there is not one Finding of Fact that supports that conclusion. The Findings of Fact relative to the Mecham matter are as follows:

> 7. On or around February 25, 2006, ms. Mecham hired Mr. Jardine to represent her in two matters; a criminal matter and a domestic matter.
>
> 8. Ms Mecham paid Mr. Jardine $10,000.00 to represent her in

both cases.

9. Mr. Jardine did not place the $10,000 in a client trust account to be taken out as earned.

10. Mr. Jardine did not keep Ms. Mecham's funds separate from his own.

11. Even though Mr. Jardine's fee agreement specifies that the funds are earned on receipt, the fee agreement instructs Ms. Mecham that she will be billed at an hourly rate of $150.00 per hour.

12. During the course of the representation, Ms. Mecham did not receive a single monthly billing statement from Mr. Jardine.

13. On or around September 6, 2006, Ms. Mecham hired Deven Coggins to represent her because she was dissatisfied with Mr. Jardine's representation.

14. On or around September 8, 2006, Mr. Coggins filed a substitution of counsel pleading in Ms. Mecham's criminal matter.

15. On or around September 22, 2006, Mr. Coggins sent a letter to Mr. Jardine requesting both the criminal and domestic files from Mr. Jardine. Mr. Jardine did not comply.

16. On or around December 6, 2006, Ms Mecham sent a letter to Mr. Jardine asking him to return her files.

17. On or around January 12, 20067, Mr. Jardine sent Ms. Mecham both the criminal and divorce files, but included the file and personal information of another client without the other client's consent.

18. Mr. Jardine did not reimburse Ms. Mecham for unearned fees at the close of his representation.

19. Mr. Jardine acknowledged at trial that he failed to return Ms. Mecham's file promptly upon demand.

ROA: 605-499, 500.

The Conclusions of Law must be supported by the Findings of Fact or they must be reversed. The District Court's conclusion that Rule 1.5 was violated should be reversed.

b. Gardner. The court also found that Mr. Jardine violated Rule 1.5 by charging Mildred Gardner an unreasonable fee. The court found the following:

> 48. According to the handwritten retainer agreement, Mr. Jardine was hired to assist Ms. Gardner with her financial affairs. . . .
>
> 55. Mr. Jardine did nothing in furtherance of the representation and did not meet with Ms. Gardner until on or after March 31, 2006, when Mr. Jardine was formally notified by a representative of JP Morgan Chase Bank that Ms. Gardner's accounts were being drained.

ROA: 605-503,504. These factual findings are disputed. Therefore the evidence must be marshaled.

1) Marshaling of Evidence. The following is the evidence in support of the Trial Court's finding.

a) Trial Exhibit Seven states that Ms. Gardner was hiring Mr. Jardine with respect to her financial affairs. 19: 9-11.

b) Money from Mildred's bank accounts was stolen by people Ms. Gardner was living with and Mr. Jardine did nothing to stop them. Pages 10, 11.

c) Mr. Jardine stated, "But, in retrospect I think that I kept

too much of the money and I should have given more back than I did." ROA: 605-36:4-5

d) Mr. Jardine stated, "I felt like I should have refunded probably $4,000 of the $5,000 based on what I can justify right now." ROA: 605-179: 20-21.

2) Greater Weight of Evidence.

a) The court found that Mr. Jardine did "nothing in furtherance of the representation." In order to determine what was required of Mr. Jardine, the Court must look to the agreement of the parties regarding the scope of the representation.

Mildred Gardner had passed on as of the date of the trial in this matter. The only evidence presented as to the parties agreement was the testimony of Mr. Jardine. His testimony and that of the handwritten agreement is the only evidence of the scope of the representation.

b) Mr. Jardine agreed with Kelli Hatch, a close friend of Mildred Gardner, that he would represent Ms. Gardner with respect to the revision of her will and trust documents. He also agreed that he would help Ms. Gardner with respect to the fact that her son was harassing her. ROA: 605:14-16.

c) The "Agreement" was a handwritten note that must be

interpreted in light of the conversation between the parties. ROA: Exhibit 7, 503:48. Mr. Jardine was hired by Mildred Gardner's agent, Kelli Hatch. The only conversation between Mr. Jardine and Kelli Hatch was that Mr. Jardine was going to revise Mildred Gardner's will and trust documents. ROA: 605-14, 15, 17

d) The agreement also spoke as to the timing of the estate planning matters. It said that Mr. Jardine would take into account Mildred Gardner's physical limitations and would meet with her further to formalize the agreement. ROA: 605-19. Mildred Gardner was in poor health and the parties anticipated that she would be in to discuss the work to be done at her convenience, but the main thrust of Mr. Jardine's work until then would be to stop Mildred's son from harassing her. ROA: 605-27, 28.

e) Mr. Jardine did not know that Mildred's bank accounts were being drained by those that lived with her until he received a call from a bank representative in about three months after he assumed representation; moreover, once again, he was not hired to assist with respect to those issues. ROA: 504:55.

c) In furtherance of the representation Mr. Jardine did the following:

I. Talked to David Gardner twice and stopped him from harassing his mother ROA: 605-179: 5-6;

II. Met with Kelli Hatch to assume representation ROA: 605-14-16;

III. Received various documents into the file, ROA: 605-8-13.

IV. Reviewed her current Will and Trust documents in anticipation of revising the same. ROA: 605-178.

V. Made three or four appointments for Mildred Gardner to come into the office. ROA: 605-27:15-19.

VI. Spoke with a bank representative. ROA: 605-30: 16,17.

VII. Went to visit Mildred Gardner and talked to her about her assets and heirs. ROA: 605-29:16-25; 77:17-25.

VIII. Had telephone conversations with Ms. Gardner's roommate, Lee. ROA: 605-34:2-23.

IX. Set up a file. ROA: 605-76: 22-23.

X. Had three or four telephone conversations with Ms.

Gardner. ROA: 605-177: 21.

XI. Had six telephone Conversations with Kelli Hatch. ROA: 605-178: 22-23.

XII. Had conversations with Police Officers. ROA: 605-179:7-8.

XIII. Gave Mildred Gardner peace of mind. ROA 605-179:22-25.

XIV. The peace of mind given to Mildred Gardner was worth $500 a month for six months. ROA: 605-184:1-6.

3) Rule 1.5 Was not Violated. Rule 1.5 of the Rules of Professional Conduct identify eight factors to determine whether a fee is "clearly excessive." The relevant factors will be analyzed below:

A) Factors of Rule 1.5.

I. Results Obtained. The major result that was obtained through the six months of representation in this matter was the peace of mind that Mildred Gardner received. The most important reason that Ms. Gardner was hiring Mr. Jardine was to prevent her son from contacting and harassing her. Mildred Gardner received peace of mind in two ways. First through the two

conversations Mr. Jardine had with David Gardner, he stopped David from contacting Mildred Gardner. Secondly, Mildred Gardner knew that she could call Mr. Jardine at any time to talk to her about her legal issues and on at least four occasions she availed herself of that privilege.

Upon request from her new attorney for a full refund of all monies paid by Mildred Gardner to Mr. Jardine, Mr. Jardine refunded forty percent (40%) of the fee that he received from Mildred Gardner. As a result of his failure to refund the remaining sixty percent (60%) Mr. Jardine was charged, found in violation and punished. This court must decide whether Mr. Jardine had an obligation to refund the additional sixty percent (60%) and if Mr. Jardine's failure to do so violates Rule 1.5.

Mr. Jardine expressed a belief that he should have refunded more of the retainer, but that belief was expressed after these proceedings were brought with 20/20 hindsight of the tremendous time involved in defending this matter in comparison to the amount of money retained. Prior to the time these proceedings were brought Mr. Jardine thought that he had complied with Opinion 136 by refunding forty percent (40%) of the retainer.

As indicated, above, under the pressure of the proceeding, and considering the fact that he might lose his license to practice law, Mr. Jardine said that he

should have returned more of the retainer. However, it does not appear that Opinion 136 would necessarily require Mr. Jardine to refund any portion of the retainer. In the context of a non-refundable retainer paid, and no services performed prior to termination of the representation, Opinion 136 states that the attorney might not have to refund any portion of the retainer. Whereas Mr. Jardine refunded 40% of the retainer after performing services and being available to the client for six months. He was justified in believing he complied with the Rules of Professional Conduct and Opinion 136. A conclusion by the Court that Mr. Jardine should have refunded more, even if true, should not have resulted in a suspension.

The Opinion 136 states as follows:

> If a substantial "non-refundable retainer" which is in part a prepaid fee is paid to an attorney and, before the attorney performs any service under the contract, the client dies, or fires the attorney, or the services called for by the contract are no longer needed for some other reason, would the attorney be guilty of charging a clearly excessive fee under DR 2-106(A) if he refused to refund any of the "non-refundable retainer"?
>
> The court went on to analyze the question and conclude that such a fee was neither automatically prohibited nor automatically permitted.
>
> Such a lawyer might, but would not necessarily be, guilty of charging an excessive fee. . . . We interpret the question as referring to a payment by a client to a lawyer of a sum of money designated as "non-refundable retainer," part of which is intended to compensate the lawyer for being available but not for specific services, and part of which is intended as present payment for legal services to be performed in the future.

ROA: 83-2.

The opinion contemplates whether failing to return any of the fee would be considered a violation of Rule 1.5. Opinion 136 further states as follows:

> If a lawyer preforms no legal services, obtains no benefits for the client and has not lost other employment opportunities as a result of agreeing to represent the client, we believe he might well be guilty of charging an excessive fee if he refused to refund part of it. . . . On the other hand, a lawyer of towering reputation, just by agreeing to represent a client, may cause a threatened lawsuit to vanish and thereby obtain a substantial benefit for the client and be entitled to keep the entire amount paid to him, particularly if he had lost or declined other employment in order to represent that particular client. . . .

Id.

In the case at bar, Mr. Jardine refunded 40% of the fee to Mildred Gardner. Mr. Jardine's testimony was the only testimony regarding the result obtained in this matter – the peace of mind of Mildred Gardner. Mr. Jardine testified that he was sure that she did receive peace of mind. He stopped her son from harassing her. Opinion 136 says if the lawyer had performed no services, "he might well be guilty of charging an excessive fee if he refused to refund part of it" ROA 82:2, emphasis added. One finds it difficult to see how Mr. Jardine, having provided services and having refunded 40% of the retainer, could be found to have charged a "clearly excessive" fee.

Mr. Jardine's testimony was based on conversations with Mildred Gardner, Kelli Hatch – Mildred Gardner's close friend, and Lee – Mildred Gardner's

roommate. Mr. Jardine was certainly in the best position to know the facts.

The burden of proof in this matter was with the OPC. It was up to the OPC to prove that the fee was excessive or unreasonable. The facts certainly do not show that the fee was excessive. Furthermore, the great weight of evidence falls against the court's finding that "nothing" was done in furtherance of the representation. The finding must be reversed.

II. Time Involved & Skill Requisite. A second factor is "time and labor required . . . and the skill requisite to perform the legal service properly." Approximately 14 categories of services were performed for Mildred Gardner by Mr. Jardine and brought out at the trial in this matter.

Mr. Jardine brought his skill to bear in representing Mildred Gardner. He made her feel comfortable again when before the representation she felt uncomfortable enough that she was willing to pay $5,000 to ease her discomfort. The OPC did not prove that the fee was clearly excessive when viewed from Mildred Gardner's point of view as was their duty.

The efforts that were expended should be viewed in light of the fact that the agreement and expressive directive of Mildred Gardner was that she would come into Mr. Jardine's office at a later time to fully describe everything that she wanted him to do as far as her legal matters were concerned.

Mildred Gardner by her own words was an elderly lady with health problems. The OPC and the Trial Court would urge this Court to believe that Mr. Jardine should have done something more than he did despite the language in her handwritten note where she directs that Mr. Jardine be aware of her "physical limitations."

III. Experience of Lawyer. A third factor is the experience . . . of the lawyer. Here, Mr. Jardine's experience as a lawyer put him in the position that he could offer peace of mind to Mildred Gardner by talking to her about the things that could be done to stop her son from harassing her. Mr. Jardine's skill as a lawyer allowed him to solve the problem in one or two phone calls to David Gardner where other lawyers may have taken more time and put Mildred Gardner though much more stress to accomplish the same task.

IV. Fixed or Contingent. A fourth factor was whether the fee was fixed or contingent. Here the $5,000 fee charged to Mildred Gardner was fixed. This factor is analyzed above.

3) Conclusion. The Trial Court's Findings of Fact regarding the excessive fee in the Gardner matter are not upheld by the evidence. The great weight of evidence was that Mr. Jardine performed services to Mildred Gardner that were of value to her and gave her peace of mind. This Court should disregard

the trial courts findings of fact and reverse the ruling.

4. Mr. Jardine did not violate Rule 8.4(d) by failing to appear at a court appearance in the OPC matter. Rule 8.4(d) states, "It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice." This issue, as indicated above, may be reviewed for correctness. The parties agree on the facts.

The OPC matter involved Mr. Jardine's representation of Kevin Woods. Kevin Woods was charged with two DUIs in the Justice Court where Judge Virginia Ward presided. Mr. Jardine's secretary, a woman who had graduated from paralegal school and who was about 55 years old, informed him that she had received a call and that the matter was continued. Mr. Jardine informed his client of the same, and neither of them appeared at the Jury Trial. Mr. Jardine was aware that there were about ten other matters set to be heard that day, so he was not alarmed or surprised when he learned that his matter was continued.

On the day of the hearing, Mr. Jardine spent the day working in his office. He received no calls from anyone regarding the hearing. At court, the matter was continued because the prosecution had witnesses who did not appear for the hearing.

Whether Mr. Jardine had appeared at the hearing or not, it would have been

continued. The Trial Court in this matter determined that "justice was impeded because Mr. Woods was deprived of the opportunity for a favorable plea deal and matters had to be continued."

However, Mr. Woods was happy that the matter was continued. He had a very extensive criminal history and he knew that if he was convicted of anything in the justice court that he would likely spend the maximum amount of time in jail possible. In fact, he was later convicted of both DUIs and the justice court sentenced him to the maximum amount of time in jail for both crimes.

In the case at bar, the prosecutor in the Woods matter testified and informed the court that he would have called Mr. Jardine if the matter needed to go forward. Mr. Jardine never received any calls from the prosecutor of the court on the day of the hearing.

No conduct was engaged in that was prejudicial to the administration of justice. The result for Mr. Jardine's client was positive as far as the client was concerned because his time for going to jail was delayed. As far as the court was concerned, the matter was continued and it would have been continued even if Mr. Jardine had appeared at the hearing. No plea deal the prosecutor would likely have offered would have been beneficial to Mr. Woods because of his extensive criminal history. The rule was not violated.

5. Mr. Jardine did not violate Rule 1.6(a) (confidentiality). Rule 1.6(a) states: "(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."

The court found that when Mr. Jardine sent Susan Mecham's file to her that he included the "personal information of another client without the other client's consent." Mr. Jardine disagrees with this finding of fact because he only asked his secretary to send Susan Mecham's file to her. He did not ask his secretary to send anyone else's personal information. In fact, Mr. Jardine's secretary had been a legal secretary for 30 years and he expected that she would competently perform the task he asked her to perform. Unfortunately, she did not. Unfortunately, she inadvertently sent confidential information of another client to Susan Mecham.

The notation at the bottom of the cover letter, "NNJ/so" indicates that Mr. Jardine "NNJ" drafted the letter and that Mr. Jardine's secretary, "so" typed the letter. The letter itself indicates that Mr. Jardine believed he was sending Susan Mechams file to her. Mr. Jardine did not think his 30-year-veteran secretary would make the mistake. Since there is a disagreement regarding the findings of fact, the evidence must be marshaled:

1) Marshaling of Evidence. The following is the only evidence that supports this conclusion:

A) Susan Mecham received someone else's file when she received her file. 141:1-11.

B) Exhibit 66, a letter from Mr. Jardine to Susan Mecham enclosing her file.

2) Greater Weight of Evidence. The OPC had the burden of proving that Mr. Jardine divulged the confidential information. The OPC did not even ask Mr. Jardine any questions regarding the file. If the OPC had asked such a question it would have found that Mr. Jardine's secretary, had inadvertently sent the wrong file materials along with Ms. Mecham's file. After Ms. Mecham discovered that she had received the wrong file materials, she put the materials aside, did not publish them, and returned them to Mr. Jardine.

3) Conclusion. Susan Mecham clearly received confidential file materials from the office of Mr. Jardine. She received them under cover of a letter which had been dictated by Mr. Jardine but typed by his secretary, Susan Ostler "so". The OPC had the burden of proving that Mr. Jardine divulged the confidential information. The OPC did not meet its burden. The evidence does not support the court's factual finding. The finding should be stricken. Mr. Jardine

did not violate Rule 8.4 and the ruling regarding this rule should be reversed.

6. Mr. Jardine did not violate Rule 1.1 (competence) in the Loomis matter. Rule 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The only Findings of Fact that support the conclusion that this rule was violated are findings 35 and 36. Those findings are as follows:

"35. During six years of representation, Mr. Jardine did little or no investigation into the facts of the case.

36. During six years of representation, Mr. Jardine did little or no research regarding the substantive and procedural law applicable to the case."

Neither of these findings are supported by any evidence introduced at the trial in this matter. Accordingly, they should be set aside.

The court also made a finding that the Summons and Complaint in this matter were served in a "deficient" manner. The parties agree that the Summons and Complaint were served in a deficient manner. They were served on the highway patrol in Salt Lake City instead of Heber City. However, no evidence was brought that it was unreasonable to effectuate the service in that manner. In fact, any reasonable person would think that serving the highway patrol, whether it

be in Salt Lake City, or in Heber City, would give the Utah Highway patrol notice of the lawsuit and cause them to answer the complaint.

When Mr. Jardine discovered the error, his plan was to re-file the lawsuit after it was dismissed and serve it at the proper place. Sometimes cases are won when one side determines that the other side is simply not going to give up. Mr. Jardine's plan was to be tenacious and unrelenting. Unfortunately, Mr. Jardine's client gave up, filed a bar complaint, and quit.

The Findings of Fact do not support the Conclusions of Law that Mr. Jardine did not provide competent representation to Jorie Loomis. Accordingly this court should reverse the ruling that Mr. Jardine violated Rule 1.1.

7. Mr. Jardine did not violate Rule 1.2(a) (communication of scope) in the Gardner matter. Rule 1.2(a) states as follows:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. . . .

None of the facts contained in the Findings of Fact support the conclusion that Mr. Jardine violated this rule.

In fact the evidence at trial was that Mr. Jardine discussed the scope of representation with Kelli Hatch, Mildred's friend and agent. Mr. Jardine and Kelli

Hatch discussed the fact that Mr. Jardine was hired to help Mildred solve the problem of her son harassing her and to help Mildred revise her will and trust documents. Furthermore the handwritten note from Mildred Gardner indicated Mr. Jardine was to wait for Mildred to come into the office to formalize the agreement and to take into account her physical limitations in so doing. The scope of representation was clearly defined. This may explain why there were no Findings of Fact to the contrary.

8. Mr. Jardine did not violate Rule 1.4(a) (communication) in the Loomis matter. Rule 1.4(a) states as follows:

> (a) A lawyer shall (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

A. Introduction. In the Loomis matter, the Court made various findings regarding the communication between Jorie Loomis and Mr. Jardine. The findings relate to a civil rights action where the complaint was dismissed twice and re-filed three times. The court concluded that Mr. Jardine violated Rule 1.4(a) by failing to properly communicate with Jorie Loomis. The findings supporting that conclusion

are as follows:

1. Mr. Jardine did not inform Mr. Loomis that the action had been dismissed. ROA: 501, paragraph 24.

2. Mr. Jardine failed to inform Jorie Loomis that a second complaint had been filed. *Id.* at paragraph 28.

3. Mr. Jardine did not inform Jorie Loomis that the second complaint had been dismissed. *Id.* at paragraph 31.

4. Mr. Jardine communicated with Jorie Loomis only a few times during the six years of representation. *Id.* at paragraph 28.

5. Mr. Jardine failed to inform Jorie Loomis of the deficient service of the complaints. *Id.* at paragraph 34.

6. Mr. Jardine failed to inform Jorie Loomis of regarding the Statute of Limitations. *Id.*

7. Mr. Jardine failed to inform Jorie Loomis how the case was to proceed to resolution. *Id.*

B. These factual findings are disputed. Therefore, the evidence must be marshaled as follows:

1. Jorie Loomis Testimony:

> Jorie Loomis complained to the bar after a "couple of years" because he remained stuck on "square one" and wasn't getting any answers from Mr. Jardine. ROA 605-158:12-22.

He testified as follows:

> "[I]f you are asking me [about] any conversations regarding the case and the status and what was going on with it, maybe one or two. If you asked how many times I called him to ask what was going on with the case and just got the reply call me back in a week, call me back in a month, maybe half dozen." ROA 605-158:24-159:12. . . .
>
> Q: Okay. How many conversations did you have where you actually talked to him about the case and decision making?
>
> A: you know, I don't think I could remember that I have had a conversation with him on the details of the case." ROA 605-159: 9-12.
>
> Q: Did you know that one complaint was filed and dismissed in this case?
>
> A: No, I did not know. ROA 605-159:20-24.

B. Greater Weight of Evidence. Mr. Jardine admits that he was not diligent with respect to this case. However, the fact that he wasn't diligent doesn't mean that he didn't communicate with Jorie Loomis. All it means is that there wasn't much to communicate about.

Jorie Loomis was informed about every critical thing that occurred as far as

the case was concerned. In this case the following occurred:

1. A demand letter was sent;
2. A Notice of Claim was filed;
3. The first complaint was filed;
4. The first complaint was dismissed;
5. A second complaint was filed;
6. A motion for default was made;
7. A motion to dismiss was made;
8. The second complaint was dismissed;
9. A third complaint was filed.

Jorie Loomis was advised of each of these events. However, because the events took place over a long period of time, and because legal proceedings are difficult for people to understand, Jorie Loomis did not remember when he was informed of the events.

1) Jorie Loomis was informed that the first complaint was dismissed and re-filed. Jorie Loomis' inability to remember certain events is exemplified by the fact that he admits that he received Exhibit 46. ROA: 605-160:18-23. Exhibit 46 is a letter from Mr. Jardine's secretary to Jorie Loomis that was sent to Jorie Loomis at the direction of Mr. Jardine. It is a cover letter where Mr. Jardine sent

Jorie Loomis a copy of the initial complaint that was filed in 2002 and a copy of the complaint that was re-filed in 2004. Jorie Loomis' testimony was that he was not informed that the first complaint had been dismissed, but he also admits he received a copy of Exhibit 46. Obviously, his own testimony is in conflict.

Mr. Jardine's testimony was that he had a conversation with Jorie Loomis about the letter and the fact that the complaint was dismissed and re-filed. ROA: 605-70:22-71:4. Exhibit 46 is a letter that was sent to Jorie Loomis in May of 2005. It was sent to him about a year after the first complaint was dismissed and re-filed. Both the 2002 complaint as well as the 2004 complaint were sent to Jorie Loomis.

Based on this evidence, the most logical assumption to make is that Mr. Jardine's testimony was more reliable on the question of whether he had a conversation with Jorie Loomis about the fact that the complaint had been dismissed and re-filed.

The greater weight of evidence on this issue is that Mr. Jardine actually conversed with Jorie Loomis about the dismissal and re-filing of the complaint. The finding should be reversed.

2) Jorie Loomis was informed that a motion to enter default was filed.

Prior to trial the parties stipulated that a binder full of exhibits would be admitted

into evidence at trial. At trial, Mr. Jardine's attorney asked that the binder be admitted into evidence, but the court would not allow the exhibits into evidence. 75:5-23. One of the exhibits in the binder, Exhibit 48 is an Affidavit of Jorie Loomis wherein he swears that the content of the a motion to enter default is accurate. This exhibit shows that Jorie Loomis was aware that a motion to enter default was filed.

3) Jorie Loomis was informed that the second complaint was dismissed and needed to be re-filed. On May 11, 2007, Mr. Jardine sent a letter to Jorie Loomis indicating that the complaint needed to be re-filed in his case. Jorie Loomis testimony was that he didn't receive any communication regarding the fact that the complaint had been dismissed and needed to be re-filed. On August 28, 2007, Mr. Jardine sent another letter to Jorie Loomis indicating that he had re-filed the complaint and that Jorie Loomis needed to get it served.

Although the above-mentioned letters were sent about a year after the second complaint was dismissed, Mr. Jardine's testimony was that he informed Jorie Loomis of the dismissal of the second complaint.

Surely Jorie Loomis must have wondered what happened with the affidavit that he signed. Mr. Jardine's testimony was that Jorie was informed about the proceedings. It makes sense that he was so informed. In any event, before any

critical deadline had passed, Jorie Loomis was informed about the dismissal. Mr. Jardine filed the complaint for him and informed him of the same.

4) Conclusion. The fact that Mr. Jardine was not diligent as far as the Jorie Loomis matter was concerned is unfortunate and deplorable, but it doesn't mean that he failed to communicate about the important things of the case. Written documents prove that Mr. Jardine communicated with Jorie Loomis about the important events of the case. Jorie Loomis' testimony is not credible because it is inconsistent. Mr. Jardine did not violate the rule regarding communication. There just wasn't much to communicate about in this case especially considering the fact that he was drawn out over six years. This Court should reverse the trial court's determination that the Rule 1.4(a) was violated in the Loomis matter.

9. Mr. Jardine did not violate Rule 1.4(a) in the Gardner Matter. As stated above, Rule 1.4(a) states as follows:

> (a) A lawyer shall (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

There were no events about which to inform Ms. Gardner. Mr. Jardine was hired

to assist Mildred Gardner with the harassment she was receiving from her son and to revise her will and trust documents. None of the Findings of Fact address this issue. Furthermore, the scope of representation as indicated by the "handwritten retainer agreement" ROA: 502:48, Exhibit 7, stated that Mr. Jardine would take into account Ms. Gardner's "physical limitations." Since the Conclusions of Law are not supported by Findings of Fact, as a matter of law, this Court should reverse the Trial Court's judgment that Mr. Jardine violated the Rule.

10. The Punishment Should Fit the Wrongs Perpetrated.

The Standards for Imposing Lawyer Sanctions state that the sanction of suspension is generally appropriate when the lawyer knowingly violates the Rules of Professional Conduct, or engages in conduct that is prejudicial to the administration of justice and causes injury or potential injury to a party, the public or the legal system. *Utah Code of Judicial Administration*, Rule 14-605(b) and *Rules of Professional Practice* 8.4(a). A public reprimand is generally appropriate when a lawyer negligently engages in the same conduct. See Rule 14-605(c).

A. Pursuant to the Above Analysis. Pursuant to the above analysis, contained in this brief, Mr. Jardine is guilty of three rule violations. Mr. Jardine did not act with reasonable diligence in the Loomis matter, failed to return Susan Mecham's file in a timely manner, and, under Rule 8.4(a), since he violated

the other two rules he also violated Rule 8.4(a).

Any rule violation is a serious matter; however, the violation of these three rules certainly does not merit a three year suspension. Little or no harm came to either Susan Mecham or Jorie Loomis as a result of the rule violations.

1) Failure to Return File Promptly. Susan Mecham later tried her criminal case and was acquitted. Moreover, all of her file materials were easy to reproduce since the prosecution had a copy of her discovery and all of the hearings were recorded. Furthermore, to prepare for the trial, her counsel should have obtained the recordings of the court proceedings; said recordings were not part of the file materials. Almost all of Ms. Mecham's file materials were the discovery which had been provided by the prosecution. Furthermore, as indicated, the file materials were returned soon enough for Ms. Mecham to use them in the preparation of her court cases. There was no harm to Ms. Mecham and no potential harm could have came to her. Mr. Jardine's actions may have been, "knowing", but they certainly did not cause Susan Mecham any harm or potential harm. Under this analysis neither suspension nor a public reprimand was appropriate for this conduct.

2) Failure to Act with Reasonable Diligence. Jorie Loomis was left with a cause of action which he could have pursued if he had

decided to do so but elected not to do so. Furthermore, the egregiousness of the lack of diligence should be viewed in light of the following facts:

1. A 42 U.S.C. 1983 case has a Statute of Limitations of four years. Jorie Loomis' case was dismissed twice and re-filed three times. The first two filings occurred within the four year Statue of Limitations. The third re-filing occurred after the court dismissed it but within the time limitations imposed by the Savings Rule.

2. Mr. Jardine's conduct should be viewed in the context of those who participated in the case with him. After the case was re-filed the second time, the Attorney General brought a motion to dismiss it for failing to serve the Highway Patrol in Heber City instead of Salt Lake City. After filing the motion, Mr. Jardine reviewed the same and determined that the Attorney General was correct; accordingly, he did not respond to the motion. A Notice to Submit was filed, but neither Mr. Jardine, the Attorney General, or the Court pursued the matter until it came up on the court's OSC calender and was dismissed for failure to prosecute. Neither the opposing side, or the Court or Mr. Jardine pursued the matter with diligence.

3. All of the actions that needed to be taken were taken within the time prescribed by rule except the matter was not served, initially within 120 days.

Each subsequent re-filing was accomplished within the time prescribed by law.

Furthermore, as indicated above, Jorie Loomis continued to have a cause of action after Mr. Jardine withdrew as his attorney.

Here, Mr. Jardine was negligent in pursing Jorie Loomis' case with reasonable diligence. The harm or potential harm caused to Jorie Loomis by Mr. Jardine was slight, if any. Under this analysis, a public reprimand would have been appropriate.

3) The Violation of Rule 8.4(a). Whenever a lawyer violates any of the other Rules of Professional Conduct he also violates Rule 8.4(a). Since Mr. Jardine admits to the violation of the other two rules, he also violated this rule.

B. Viewed As it Now Stands. Mr. Jardine now stands convicted of 15 rule violations and is sentenced to a three year suspension of his privilege to practice law. However, the rules were either negligently violated, or no harm came or could have come as a result of the rule violations. Accordingly, a suspension was not appropriate.

C. Prior Discipline. Mr. Jardine previously received two Public Reprimands. The first was for having sex with a client. Needless to say, the conduct was never duplicated.

The second public reprimand was related to charging an excessive fee. Mr.

Jardine charged a $3,000 retainer and refused to return any of the money. This conduct was similar to the conduct charged in the Mecham and Gardner matters. However, in Mecham, pursuant to the above analysis, no fee should have been refunded. In Gardner, 40% of the fee was refunded.

D. Other Discipline Cases. The Addendum contains a Summary of Attorney Discipline. The Summary contains ten cases which were brought before this court where the conduct complained about was more serious than the conduct which Mr. Jardine was found to have committed. In each case, the conduct involved some type of dishonesty. The Trial Court specifically found that Mr. Jardine did not commit any conduct involving dishonesty, fraud or deceit. Despite this, the punishment Mr. Jardine has received is three times as long as the longest discipline imposed in any of the cited cases.

CONCLUSION

As of the date of this brief, Mr. Jardine has now been suspended from the practice of law for seven months. His practice has been devastated. He has had to move out of his office. He has had a difficult time finding a way to make ends meet. Worst of all, the thing that he likes to do the best has been taken from him.

Given the above analysis, Mr. Jardine believes it would be appropriate for the court to reverse the judgment of the trial court and enter a public reprimand as

discipline in this matter.

Dated: April 21, 2011

By: _____
Nathan N. Jardine
In Pro Per

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2011, I caused a true and correct copy of the foregoing to be served by personally delivering the same to the following:

Barbara L. Townsend, Esq.
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

_____
Nathan N. Jardine

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